

1985

Patricia M. Burke v. Richard C. Burke : Brief of Appellant

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

PATRICIA M. BURKE, :
Plaintiff/Respondent, : CASE NO. 20404
vs. :
RICHARD C. BURKE, :
Defendant/Appellant. :

BRIEF OF APPELLANT

Appeal from the judgment of the Third Judicial
District Court of Salt Lake County, the Honorable
Earnest F. Baldwin presiding.

UTAH SUPREME COURT
BRIEF

UTAH
SUPREME COURT

1983 20404
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IN THE SUPREME COURT OF THE STATE OF UTAH

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|-----------------------|---|-----------------|
| PATRICIA M. BURKE, | : | |
| | : | Civil No. 20404 |
| Plaintiff/Respondent, | : | |
| | : | |
| vs. | : | |
| | : | |
| RICHARD C. BURKE, | : | |
| | : | |
| Defendant/Appellant. | : | |

BRIEF OF APPELLANT

Appeal from the judgment of the Third Judicial
District Court of Salt Lake County, the Honorable
Ernest F. Baldwin presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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| PATRICIA M. BURKE, | : | |
| | : | Case No. 20404 |
| Plaintiff/Respondent, | : | |
| vs. | : | |
| RICHARD C. BURKE, | : | |
| Defendant/Appellant, | : | |

STATEMENT OF THE ISSUE PRESENTED ON APPEAL

1. Whether the trial court erred in a divorce proceeding in determining that property that had been acquired during the marriage in the name of a corporation was actually marital property and therefore, an asset of the marriage to be divided between the parties.

STATEMENT OF THE CASE

In this proceeding, appellant was the defendant in a divorce action filed by his wife as civil number D-15225, in the Third Judicial District Court in Salt Lake County, State of Utah. The parties were initially divorced in 1979 but all other issues concerning child custody, support and property were reserved to a later time for a trial. The matter came on for trial on October 24, 1980, before the Honorable Ernest F. Baldwin, sitting without a jury. Memorandums were requested by the court and on November 10th, 1980, the court entered a minute entry decision. Findings of fact and conclusions of law and the decree of divorce were not entered in the matter until September 7, 1984, and an appeal from that decision was taken to this court.

RELIEF SOUGHT ON APPEAL

The appellant requests that this court reverse the decision of the trial court with respect to certain parcels of real estate which were awarded jointly to the parties and rule that all such property was corporate property belonging to Advance Business Equipment, Inc.

STATEMENT OF THE FACTS

The parties in this action were married in 1960 and lived together as husband and wife until approximately March, 1977, when the wife filed for divorce in the Third Judicial District Court of Salt Lake County, State of Utah, in civil number D-15225.

On April 6, 1967, the appellant, along with others, formed a corporation known as Advance Business Equipment, Inc. (See R. Exhibit "11") The corporation existed continually until the time of the parties divorce and, in fact, is an operating entity at the present time. The corporation has had various officers and a board of directors that met at various times and held stockholders meetings at least once a year. The corporation's charter was never revoked or suspended by the State of Utah and the corporation was, at the divorce hearing in October of 1980, and is currently, in good standing with the State of Utah. The appellant is and has been the president of the corporation during its duration and at various times has held between 25% and 50% of the stock, either personally or with the ability to vote the stock held by his children. During the life of the corporation, it has had approximately eight additional stockholders, with the amount of stock held varying at any given time. There have

always been at least three stockholders in addition to the defendant and his children. (See R. Exhibit "11", the corporate record book showing stock issued, the corporate minutes and other activities of the corporation.)

The corporation operated as a closed operation with the stock being held by the appellant, his children and other stockholders. The nature of the business was to supply and distribute various types of business equipment as a wholesaler. (See R. articles of incorporation Exhibit "1") All transactions conducted by Advance Business during it's life have been conducted as a corporation, including the use of sales receipts, letters, other documents, etc. They all bear the corporate name and are signed by Richard Burke as president of the corporation. (See R. p.144, defendant's memorandum and Exhibits which were introduced at the time of the trial.)

On three occasions prior to the parties divorce, the corporation purchased three separate pieces of real estate. The first transaction took place on June 15, 1970, when the corporation purchased, for investment purposes, a dwelling situated on approximately one-third of an acre with an adjacent two and one-half acre pasture and an adjacent building lot. A mortgage was obtained at Ogden First Federal in the name of Advance Business Equipment, Inc., and all payments on the mortgage were made by Advance Business Equipment. Approximately three months after the acquisition of the property, the parties moved into the home and used the same as their residence, until 1977 when the defendant was forced to leave. The respondent

continued to reside in the home and the company made the monthly mortgage payments. (See R. corporate minute book, Exhibit "11", minutes of the meeting of June 15, 1970.)

The second transaction took place later in 1970, when the corporation acquired approximately 15 acres of raw, undeveloped land now known as Pepperwood. This acquisition was in the form of a contract for the purchase of land between Advance Business Equipment, Inc. and H.R. Fisher who owned the property in fee simple. The contract called for one yearly payment. The company paid the annual payment until 1976 when, because the company was unable to make the payment, the property was transferred to Sandra Maxwell, the sister of the defendant. Maxwell assumed the existing contract between Advance Business and H.R. Fisher. (See R. appellant's and defendant's memorandum p.144 and 153.)

The third transaction took place on June 14, 1978, when a building lot was acquired by the company in a subdivision known as Dimple Dell. The company purchased the lot in the company name pursuant to a resolution of the board of directors. (See R. Exhibit "11", minutes of the meeting of June 14, 1978.)

Following the trial of this matter on October 24, 1980, the trial judge required memorandums from the parties, (See R. p.144 and 153) and specifically requested that the parties address the issue of whether or not Richard Burke was the alter ego of Advance business, or in effect, whether the corporate veil of Advance Business could be pierced with respect to the three property transactions set forth above. The court, after reviewing the memorandums, ruled, as set forth in the findings of

fact and conclusions of law and the decree of divorce, (Exhibit "1" and "2" to this brief) that the property consisting of the home and the adjoining pasture land was marital property and the home was awarded to the respondent and the pasture land to the defendant. The building lot the Dimple Dell subdivision was marital property and was awarded jointly to the parties, but the 15 acres in Pepperwood was not marital property and therefore, would not dispose of it in the divorce.

Because the appellant believes that this ruling is inconsistent in light of the facts presented, this appeal was taken in an effort to clarify that actual status of the property in question.

SUMMARY OF THE ARGUMENT

The trial court erred in determining that the Pepperwood property was not marital property but in finding that the parties' residence, the adjoining pasture land and the Dimple Dell lot were marital property. That the proper ruling should have been that all property in question belonged to the corporation, that the appellant herein was not the alter ego and that none of the property, therefore, was marital property subject to disposition in the divorce proceeding.

ARGUMENT

The question before this Court in the instant case does not sound in domestic relations but sounds in corporations. The relief the appellant seeks is based upon the clear pronouncements of this Court in a number of cases which establish the guidelines for examining the actual existence and viability of a corporation

and whether or not that entity is truly a corporation or is merely the alter ego or a shell for the operation of a single individual. There is no factual dispute in this case as to the establishment and existence of the corporation known as Advance Business Equipment, Inc. There is no factual dispute that that corporation purchased the property in question and made the payments on it. There is no factual dispute that at the time of the initiation of the divorce and at the time of the actual divorce trial, all three of the properties were held in the name of Advance Business Equipment, Inc., and had never been in the name of either of the parties to the divorce. The only question then is was the corporation really the alter ego of Richard Burke or was it, pursuant to this Court's guideline, an bone fide corporation and therefore, the property in question would not have been part of the marital estate subject to disposition in the divorce proceedings by Judge Baldwin.

Utah law is clear as to the requirements for disregarding the corporate entity upon a claim that the corporation is merely an extention of an individual. It should be carefully noted that this Court is a court of equity, and should pierce the corporate veil only after great caution is exercised and not precipitantly and that each case involving the existence or non-existence of the corporate entity must rest upon it's special facts and circumstances. (See Corporation §14 18 Am Jur 2d.) The burden of proof is upon the party moving to have the corporation shield set aside, or in this case, the respondent in the trial court. In Utah, three decisions of this Court have enunciated the

requirements that a trier of fact must consider in determining whether the moving party has met the burden, thus setting aside the corporate entity.

In the case of Dockstader v. Walker, 510 P.2d 526 (Utah 1973), Justice Ellett, writing for a unanimous court, stated as follows:

Ordinarily a corporation is regarded as a legal entity, separate and apart from the stockholders, but the corporation veil which protects stockholders from liability for debts of the corporation will be pierced and true relationship between stockholders and corporation looked at where legal entity is used to perpetrate a fraud, to justify a wrong, or to defeat justice.

The term "alter ego" is used to describe a situation where courts go behind corporate entity and hold a stockholder liable for debts of the corporation or to hold that it is the stockholder and not the corporation which owns the assets.

The "alter ego" doctrine is generally applied to situation known as "one-man corporation," i.e., where one man owns practically all of the stock, either directly or through others who hold it for his use and benefit, and where stockholder uses the corporation as a shield to protect him from debts or wrongdoings; it cannot be applied to make stockholder liable for legitimate debts of the corporation unless he is so closely allied with the corporation through ownership and management as to enable courts to see clearly that corporate entity is but a sham and it is the stockholder who is doing business behind the corporate shield. (Id at 371, emphasis added.)

This concept was further amplified by Justice Maughan, again writing for a unanimous court, in Norman v. Murray First Thrift & Loan Co., 596 P.2d 1028 (Utah 1979), wherein the following comment was made:

In order to disregard corporate entity...there must be a concurrence of

two circumstances: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, (i.e. vis the corporation is, in fact, the alter ego of one or a few individuals), and (2) observance of the corporation form would sanction a fraud, promote injustice, or an inequitable result would follow. (Id at 1030)

Most recently, in the case of Messick v. PHD Trucking Service, 678 P.2d 791 (Utah 1984), Justice Hall further refined the doctrine set out by Justice Maughan in Norman when he said:

The first prong of the test is often termed the "formalities requirement," referring to the corporate formalities required by statute. It is established upon a showing of the corporation's failure to observe said statutory formalities. The test's second prong is addressed to the conscience of the court, and the circumstances under which it will be met will vary with each case.

He further goes on to say that:

In examining evidence by which a trial court should be upheld in disregarding a corporate entity, the court would look at the following: evidence of the corporation's neglect of statutory formalities, and evidence that the observance of a corporate entity would sanction a fraud or promote injustice or inequitable results. (Id at 794)

There is no question in this case that all of the corporate formalities were observed by Advance Business Equipment in conducting it's business, including the purchase of the property in question. The only real issue is the conscience of the court and whether or not the observance would sanction a fraud, promote injustice or an inequitable result. In effect, that is what Judge Baldwin was called upon to determine after hearing the

testimony and reviewing the exhibits in this case at the trial in October of 1980. His ruling, however, is inconsistent and therefore, we are unable to determine precisely what he found concerning this second prong of the test. On the one hand, he determined that the Pepperwood property which was, in effect, purchased by the corporation and then sold to a third party was corporate property and not subject to his decision. On the other, he find the Dimple Dell and the pasture land and home to be marital property and divided that between the two parties. It was the same corporation involved, the same type of activities, the same status and yet the ruling is inconsistent.

It is appellant's position that the only consistent ruling, given the facts presented, would be that all of the property was corporate property and that it was not marital property subject to distribution by the court in a divorce proceeding. There was no indication of fraud, and no indication of injustice. Appellant concedes that perhaps the result may appear to be inequitable if one looks at the property purely in a sense of what each of the parties received from the divorce proceedings. It only becomes inequitable, however, if we determine that the appellant received all of the property personally and the defendant had nothing. This, of course, was not the case. The proper result would have been that the corporation, of which the appellant is a stockholder, but only one of many, would have received the use and benefit of the property. In addition, the respondent received the use and benefit of the home and the property during the course of the marriage, and received the bulk

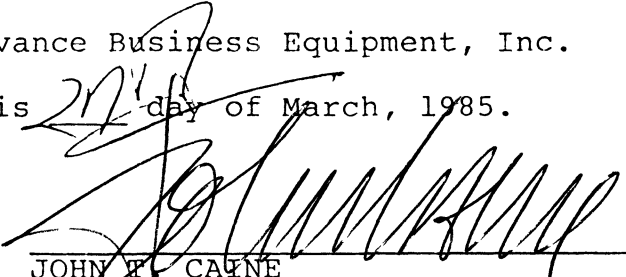
of the personal property that the parties acquired during their marriage. Therefore, if one assumes the existence and the viability of the corporation and that it is the corporation that would receive the property, if this decision were reversed, rather than the appellant, then there is no inequity or injustice present.

Appellant believes that the trial court cannot have it both ways. It cannot find one piece of property as a non-marital asset and the others as marital assets when all of the facts concerning the acquisition of the property in the name of corporation and distribution of the property were the same. This inconsistency clearly demonstrates an abuse of discretion by the court and a decision which is clearly erroneous in light of the evidence and therefore, is the proper subject for a reversal by this Court.

CONCLUSION


Appellant respectfully requests that this court, in furtherance of it's corporate doctrine set forth in the cases cited herein, review the findings of the trial court and determine that the property in question belonged to Advance Business Equipment and not to the parties and therefore, was not the subject of distribution in a marital estate in a divorce proceeding, and reverse the lower court's decision and restore the property in question to Advance Business Equipment, Inc.

RESPECTFULLY SUBMITTED this 22nd day of March, 1985.


JOHN F. CARNEY
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the above and foregoing brief to the Mark Larson, Ungricht, Randle & Deamer, Suite 520 Boston Building, 9 Exchange Place, Salt Lake City, Utah 84111, postage prepaid, this 27th day of March, 1985.


SHERRI NELSON, Secretary

Appendix

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IN THE DISTRICT COURT
COUNTY OF SALT LAKE, STATE OF UTAH

| | | |
|--------------------|---|----------------------|
| PATRICIA M. BURKE, | : | |
| Plaintiff, | : | FINDINGS OF FACT AND |
| | : | CONCLUSIONS OF LAW |
| | : | NUNC PRO TUNC |
| vs. | : | |
| | : | Civil No. D-15225 |
| RICHARD C. BURKE, | : | |
| Defendant. | : | |

The above entitled matter came on regularly for hearing on the 24th day of October, 1980, before the Honorable Ernest F. Baldwin, Jr., one of the judges of the above entitled court, sitting without a jury, plaintiff being personally present and represented by counsel, Gerald Gundry, and defendant being personally present and represented by counsel, John T. Caine, and testimony having been taken over a period of two days, and the court also requesting the filing of written memorandum, and after reviewing all of the evidence and the memorandums of the parties, and the court being fully advised in the premises, now finds as follows:

FINDINGS OF FACT

1. That the parties were previously divorced by this court on September 16, 1977 and the court, therefore, for the purpose

of this hearing, was to dispose of the marital property.

2. That plaintiff is a fit and proper person to have the care, custody and control of the two minor children of the parties, with reasonable rights of visitation in the defendant.

3. That plaintiff is in need of child support and defendant's income would allow for the payment of \$150 per month per child, for a total of \$300 per month.

4. That the defendant is in arrears in child support from a previous order of the court in the sum of \$6,900.

5. That plaintiff is able bodied and presently employed, and is in no need of alimony.

6. That the parties' home and the adjoining acreage, located at 4596 South 785 East, Salt Lake City, Utah, is marital property and the home should be awarded to the plaintiff and the adjoining acreage should be awarded to the defendant. That each party should assume and discharge any debt against the property awarded to him or her, and hold the other harmless therefrom.

7. That the parties' building lot in Dimple Del Subdivision #2 and their cabin site in Island Park, Idaho, are marital property and should be awarded equally to the parties.

8. That the 15 acres of unimproved property, known as Pepper Wood, is not marital property and, therefore, no action should be taken by the court concerning its disposition.

9. That the plaintiff should be awarded all of the furniture, fixtures and wares located in her possession with the exception of the following items currently in her possession, which should be awarded to the defendant: the Navaho Indian rug,

the Remington prints, a set of silver prints, a painting of a seascape, a painting of an Indian, a book of the Old West, all of which should be awarded to the defendant. In addition, defendant is awarded his grandmother's brass bell, an Indian ceremonial rug, one of the three other Indian rugs, three pen sketches, three Hafen family history books and one-half of all the photographs.

10. That defendant should be awarded all of his interest in the company known as Advanced Business Equipment.

11. That each party should assume and discharge their own attorney's fees and costs incurred in this action.

From the foregoing Findings of Fact, the court concludes as follows:

CONCLUSIONS OF LAW

1. That the plaintiff should be awarded custody of the parties two minor children, subject to reasonable visitation in the defendant.

2. That the defendant should be ordered to pay the sum of \$150 per month per child as and for child support, for a total of \$300 per month.

3. That judgment should be entered against the defendant for \$6,900 for child support arrearages to date.

4. That the plaintiff should not be awarded any alimony now or in the future.

5. That plaintiff should be awarded the home at 4596 South 785 East, Salt Lake City, Utah. The defendant should be awarded the adjoining acreage to the home. That each party should assume

and discharge any debt against the property and hold the other harmless therefrom.

6. That the building lot in Dimple Del Subdivision #2 and the cabin site in Island Park, Idaho, should be awarded equally to the parties.

7. That the 15 acres of unimproved property known as Pepper Wood is not marital property, and, therefore, no action should be taken by the court concerning its disposition.

8. That the plaintiff should be awarded all of the furniture, fixtures and wares located in her possession with the exception of the following items currently in her possession, which should be awarded to the defendant: the Navaho Indian rug, the Remington prints, a set of silver prints, a painting of a sea scape, a painting of an Indian, a book of the Old West, all of which should be awarded to the defendant. In addition, defendant should be awarded his grandmother's brass bell, an Indian ceremonial rug, one of the three other Indian rugs, three pen sketches, three Hafen family history books and one-half of all the photographs.

9. That defendant should be awarded all of his interest in the company known as Advanced Business Equipment.

10. That each party should assume and discharge their own attorney's fees and costs incurred in this action and hold the other harmless therefrom.

DATED this ____ day of August, 1984.

BY THE COURT:

ERNEST F. BALDWIN, JR.
DISTRICT COURT JUDGE

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IN THE DISTRICT COURT
COUNTY OF SALT LAKE, STATE OF UTAH

| | | |
|--------------------|---|-----------------------------|
| PATRICIA M. BURKE, | : | DECREE OF DIVORCE |
| Plaintiff, | : | NUNC PRO TUNC |
| vs. | : | Civil No. D-15225 |
| RICHARD C. BURKE, | : | <i>Sept 20th</i> |
| Defendant. | : | |

The above entitled matter came on regularly for hearing on the 24th day of October, 1980, before the Honorable Ernest R. Baldwin, judge of the above entitled court, sitting without a jury, and plaintiff being personally present and represented by counsel, Gerald Gundry, and defendant being personally present and represented by counsel, John T. Caine, and testimony having been taken over a period of two days, and the court also requesting the filing of written memorandum, and after reviewing all of the evidence and the memorandums of the parties, and the court being fully advised in the premises, and having heretofore signed and entered herein its findings of fact and conclusions of law, NOW, THEREFORE,

ORDERS AS FOLLOWS:

1. That the parties were previously divorced by this court on September 16, 1977, and the court, therefore, for the purpose of this hearing, was to dispose of the marital property.

2. That the plaintiff shall be awarded the custody of the parties' two minor children, subject to reasonable visitation in the defendant.

3. That judgment shall be entered against the defendant for \$6,900 for child support arrearages to date of *October 1980*

4. That the plaintiff shall not be awarded any alimony now or in the future.

5. That plaintiff shall be awarded the home at 4596 South 785 East, Salt Lake City, Utah. The defendant shall be awarded the adjoining acreage to the home. That each party shall assume and discharge any debt against the property and hold the other harmless therefrom.

6. That the building lot in Dimple Del Subdivision #2 and the cabin site in Island Park, Idaho, *the real property on Namba Way* shall be awarded equally to the parties. *all other properties are awarded in equal shares to the parties*

7. That the 15 acres of unimproved property known as Pepper Wood is not marital property, and, therefore, no action shall be taken by the court concerning its disposition.

8. That the plaintiff shall be awarded all of the furniture, fixtures and wares located in her possession with the exception of the following items currently in her possession, which shall be awarded to the defendant: the Navaho Indian rug, the Remington prints, a set of silver prints, a painting of a sea scape, a plaintiff of an Indian, a book of the Old West, all of

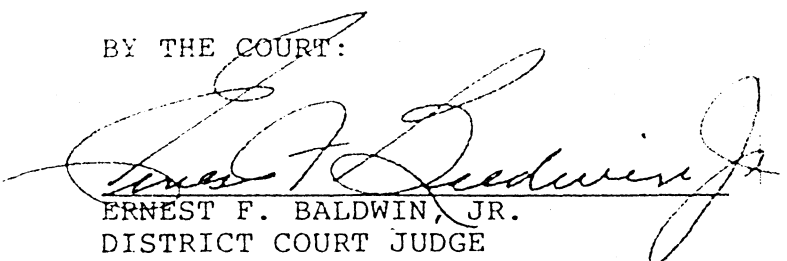
which shall be awarded to the defendant. In addition, defendant shall be awarded his grandmother's brass bell, an Indian ceremonial rug, one of the three other Indian rugs, three pen sketches, three Hafen family history books and one-half of all of the photographs.

9. That defendant shall be awarded all of his interest in the company known as Advanced Business Equipment.

10. That each party shall assume and discharge their own attorney's fees and costs incurred in this action and hold the other harmless therefrom.

DATED this 7 day of ^{September} ~~August~~, 1984. - ^{as of.} ~~Effective October,~~
1980.

BY THE COURT:


ERNEST F. BALDWIN, JR.
DISTRICT COURT JUDGE